Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

PACIFIC MARITIME ASSOCIATION,

Petitioner,

v.

THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 68, an unincorporated association,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public sector union is liable under Section 303 of the Labor Management Relations Act for secondary boycott activities that inflict substantial economic damage upon a neutral employer.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, the following entities were defendants below: (1) The International Longshore and Warehouse Union, Local 63, an unincorporated association, and (2) The International Longshore and Warehouse Union, Local 13, an unincorporated association. Pacific Maritime Association ("PMA") has no parent company or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Pacific Maritime Association ("PMA") respectfully petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a-10a), is reported at 198 F.3d 1078. The United States District Court's Order Granting Defendant The International Longshore and Warehouse Union, Local 68's Motion to Dismiss (*id.* at 11a-14a) is not reported. The District Court's Order Granting Certification Under Rule 54(b)(*id.* at 15a-16a) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 8, 1999. This petition is being timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

1. Section 303 of the Labor Management Relations Act provides, in pertinent part, that "[i]t shall be unlawful . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended." 29 U.S.C. § 187.

2. Section 8(b) of the National Labor Relations Act provides, in pertinent part, that "[i]t shall be an unfair labor practice for a labor organization or its agents . . . (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees." 29 U.S.C. § 158.

3. Section 2(5) of the National Labor Relations Act provides, in pertinent part, that "[t]he term 'labor organization' means any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers."

4. Section 2(3) of the National Labor Relations Act provides, in pertinent part, that "[t]he term 'employee' . . . shall not include any individual employed by any . . . person who is not an employer as herein defined." 29 U.S.C. § 152(3).

5. Section 2(2) of the National Labor Relations Act provides, in pertinent part, that "[t]he term 'employer' . . .

shall not include . . . any State or political subdivision thereof." 29 U.S.C. § 152(2).

STATEMENT OF THE CASE

The decision below contradicts a well-settled interpretation of Section 303 of the Labor Management Relations Act (the "LMRA") that has been virtually unquestioned for more than two decades and, as the Ninth Circuit expressly recognized (App., *infra*, 7a), creates a direct conflict between the Second and Ninth Circuits on an important question of federal labor law. At issue in this case is the so-called "secondary boycott," a practice by which labor unions intentionally inflict substantial economic damage upon neutral employers in order to pressure indirectly the employer with whom the unions actually have a labor dispute. Section 303 of the LMRA and Section 8(b)(4) of the National Labor Relations Act (the "NLRA") clearly prohibit secondary boycotts on the part of unions that are subject to the NLRA.

Ever since the holding of the U.S. Court of Appeals for the Second Circuit in *Marriott In-Flite Services v. Local 504, Air Transport Division, Transport Workers*, 557 F.2d 295 (2d Cir. 1977), the rule has been that the LMRA also prohibits secondary boycotts by unions that are *not* ordinarily subject to the NLRA where the boycotts affect one or more neutral employers subject to the NLRA. The Second Circuit held that the statute's language is ambiguous and that the legislative history that accompanied the 1959 amendments to the NLRA's prohibition of secondary boycotts clearly and unequivocally demonstrates congressional intent to extend the secondary boycott ban to those unions that had previously been exempted. In the decision below, the Ninth Circuit categorically rejected *Marriott*, holding instead that the LMRA's "plain meaning" prohibits secondary boycotting by only those unions that are subject to the NLRA, regardless of who is affected by that conduct, and that therefore the legislative history should not be consulted.

Certiorari should be granted to resolve the conflict between the Second and Ninth Circuits. The question

whether Section 303 of the LMRA prohibits public sector unions from engaging in secondary boycott activities that inflict substantial economic damage upon neutral employers is important and has ramifications beyond public sector unions. Indeed, if permitted to stand, the rule announced by the Ninth Circuit would allow non-NLRA unions, including airline unions, railroad unions, and public sector unions such as respondent Local 68, to engage in malicious, devastating boycotts against neutral third parties such as petitioner PMA with absolute impunity, in direct violation of congressional intent. Review by this Court is therefore warranted.

A. Factual Background

1. The Parties

The PMA is a multi-employer association of shipping, stevedoring and terminal companies that operate out of the Los Angeles/Long Beach Port, as well as other ports along the West Coast in California, Oregon and Washington. There are approximately 110 member employers. The PMA is the bargaining representative for the employers and handles their labor relations issues with respect to longshoremen and clerks. Complaint, ¶ 3.

Respondent Local 68 of the International Longshore and Warehouse Union (ILWU) represents a small unit of persons known as Los Angeles/Long Beach "port pilots" who pilot vessels in and out of the Port of Los Angeles, from the Port breakwater to the vessel's berth at one of the various docks of the terminals operated by PMA members. *Id.* ¶ 7. These pilots are employed by the City of Los Angeles (the "City"), Harbor Department, for the Port of Los Angeles and have no employment relationship with PMA member companies whatsoever. *Id.*

Local 13 and Local 63 of the ILWU are labor organizations comprising longshoremen and marine clerks employed by PMA member companies at the Los Angeles/Long Beach Port. *Id.* ¶ 4. The ILWU is certified as the exclusive bargaining representative for the longshoremen and clerks employed by PMA member companies. *Id.*

2. The Secondary Boycott

On June 30, 1997, the collective bargaining agreement between Local 68 and the City that covered the port pilots expired. Complaint, ¶ 7. Negotiations for a new collective bargaining agreement ensued, but to no avail, leaving Local 68 without a successor agreement. *Id.* Neither PMA nor any of its members were parties to, or involved in, the labor dispute between Local 68 and the City, except to the extent that Local 68 engaged in secondary boycott activities designed to pressure the PMA to put pressure on the City to accede to Local 68's demands. *Id.*

On July 9, 1997, Local 13 and Local 63 warned PMA of Local 68's labor dispute with the City and made clear their intention to honor picket lines by Local 68. *Id.* ¶ 8. Knowing the economic injury certain to result from such secondary activity, PMA filed an unfair labor practice charge with the NLRB on July 10, 1997, seeking to prevent any unlawful secondary picketing by Local 68 at PMA terminals. *Id.* ¶ 9.

Local 68 began its strike against the City on Saturday, July 12, 1997, and contemporaneously commenced secondary picketing at the Yusen Terminal which is operated by PMA member Centennial Stevedoring Services ("CSC"), a joint venture of Yusen Terminal, Inc. ("Yusen") and Stevedoring Services of America ("SSA"), also PMA member companies. *Id.* ¶ 10. CSC had a substantial number of Local 13 and Local 63 members scheduled to work that day at its terminal, but as warned, Local 13 and Local 63 and their members refused to cross Local 68's illegal picket line and refused to work. *Id.* They again refused to work on July 13, July 14, and July 15 because Local 68 continued to picket the Yusen Terminal, with the result being significant economic injuries to the targeted companies, CSC, Yusen and SSA. Local 68's picketing at the Yusen terminal had nothing to do with any dispute with that terminal or its operators. Rather, Local 68's actions were designed to put pressure on PMA member companies to, in turn, pressure the City to meet its demands and enter into a new collective bargaining agreement on Local 68's terms. *Id.* ¶ 17.

On Sunday morning July 13, 1997, Local 68 targeted two additional neutral terminals, the Matson Terminal and Evergreen Terminal, which are operated by PMA members Matson Terminals, Inc. ("Matson") and Marine Terminals Corporation ("MTC") respectively. *Id.* ¶ 11. Both Matson and MTC had large numbers of members of Local 13 and Local 63 scheduled to work that day at their terminals, but no work was performed. *Id.* Indeed, Local 13 and Local 63 and their members refused to cross the picket lines and refused to work that day because Local 68 was picketing the terminals. Local 68 returned to both of these terminals again on July 14 and July 15, resulting in a three-day work stoppage. *Id.* This picketing, boycotting, and striking caused significant damage to Matson and Matson Navigation, Inc. and to MTC and Evergreen America, Inc. *Id.*

Neither the Yusen, Matson, nor Evergreen terminals nor any of their operators had any involvement in Local 68's dispute with the City, yet they all suffered significant damages by way of being targeted by Local 68 for its secondary activity.

On July 14, 1997, the NLRB, through Region 21, filed a petition for an injunction under Section 10(l) of the NLRA in the United States District Court for the Central District of California seeking a temporary restraining order against the secondary picketing by Local 68. *Id.* ¶ 12. This immediate federal court injunction became unnecessary, however, because the state court issued its temporary restraining order against the picketing on the next day. On August 1, 1997, Region 21 withdrew its petition in the district court (which was based on PMA's original unfair labor practice charge against Local 68), because the NLRB (in Washington) concluded that it did not have jurisdiction over Local 68, as a union of public employees.

B. The Proceedings Below

1. The District Court's Decision

On September 10, 1997, PMA filed its Complaint against ILWU Local 68, Local 63 and Local 13, in which PMA

sought damages under Section 303 of the LMRA for the economic injury stemming from their four-day illegal work stoppage. Local 68 moved for dismissal for lack of subject matter jurisdiction, asserting that it is not a "labor organization," as defined elsewhere in the NLRA, and therefore is not proscribed by Section 303. PMA opposed the motion on the grounds that such a construction would defeat both (a) the objective of Section 303 — to protect innocent, neutral entities from economic injury caused by secondary boycott activity engaged in by "any" labor organization — and (b) the 1959 amendments to the statute, which were explicitly designed to extend the secondary boycott prohibitions to public sector unions, such as Local 68, which previously had been excluded from its reach.

Holding that the language of the NLRA compelled a finding that the statute did not apply to public sector unions, the district court refused to consider other indicia of legislative intent, and it granted Local 68's motion to dismiss, holding that a public sector union is not prohibited from secondary boycott activity under Section 303.

2. The Ninth Circuit's Decision

PMA appealed to the Ninth Circuit Court of Appeals, arguing that the purported "plain language" seized upon by Local 68 was buried under four layers of statute, so remote from Section 303 that its meaning eluded Congress when it amended the Act in 1959. PMA further argued that the district court incorrectly refused to consider both the purpose and the legislative history behind the secondary boycott provisions, which led the district court to protect Local 68 from liability for inflicting economic pressure on persons not involved in the labor dispute, rather than protecting the neutrals targeted by Local 68 — an unreasonable result plainly at odds with the policy of the legislation as a whole.

On December 8, 1999, the court of appeals filed its opinion affirming the district court's judgment of dismissal. Rejecting PMA's argument that Section 303 did not clearly and unambiguously exclude governmental unions, the court of appeals concluded that it had no reason to consider the legislative history. App, *infra*, at 7a. The Court expressly

"recognize[d] [that] the Second circuit reached a different conclusion in *Marriott In-Flite Services v. Local 504, Air Transport Division, Transport Workers*, 557 F.2d 295 (2d Cir. 1977)."

REASONS FOR GRANTING THE WRIT

The Court's review is necessary to resolve a direct conflict in the decisions of the federal appellate courts on an important question of federal labor law. Whether public sector unions may engage in secondary boycott activity free of legal consequences is a matter of significant concern to employers across the country. As was the case here, a secondary boycott can quickly inflict substantial damages. Guidance from the Court as to the legality of these boycotts is needed before public sector unions begin to unleash this new weapon in their arsenal. Nor is the scope of the Ninth Circuit's rule limited to public sector unions — organizations made up of police, firefighters, school teachers, and a variety of other occupations where the effects of labor unrest can be particularly devastating to the public interest. The Ninth Circuit's analysis would also leave neutral NLRA employers helpless to seek redress when farm employees, railroad workers, and airline flight attendants and pilots engage in secondary boycotts. The number of workers in such non-NLRA unions is significant, as is the amount of damage that would be inflicted if they are suddenly permitted to engage in secondary boycotting.

A. The Ninth Circuit's Approach

The Ninth Circuit began its analysis by examining the statutory language at issue. That analysis, far from involving a straightforward reading of "plain language," proceeded in five separate steps involving five different statutory provisions:

First, the court observed that Section 303 of the LMRA, 29 U.S.C. § 187, prohibits "labor organizations" from engaging in the conduct prohibited by Section 8(b)(4) of the NLRA. If Local 68, as a public sector union, was not a "labor organization" for purposes of Section 303, then there was no liability.

Second, the court examined Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4), which prohibits a "labor organization" from engaging in secondary boycott activity. The court reasoned that only if a union qualified as a "labor organization" under both Section 303 of the LMRA and Section 8(b)(4) of the NLRA could it be prohibited from secondary boycotting.

Third, the court turned to Section 2(5) of the NLRA, 29 U.S.C. § 152(5), which defines "labor organization" as serving "employees" in dealing with "employers." In the court's view, only if Local 68 served "employees" in their dealings with "employers" could it be considered a "labor organization" for purposes of Section 303 of the LMRA and Section 8(b)(4) of the NLRA.

Fourth, the court noted that Section 2(3) of the NLRA, 29 U.S.C. § 152(3), excludes from the definition of "employee" anyone employed by any person that does not meet the statutory definition of "employer."

Fifth, the court reviewed Section 2(2) of the NLRA, 29 U.S.C. § 152(2), and observed that the term "employer" specifically excludes "any State or political subdivision thereof."

Based on this approach, the Ninth Circuit discerned what it called "plain, unambiguous language" (App., *infra*, 7a) and concluded that because the members of Local 68 work for the Harbor Department of the City of Los Angeles, they work for a "State or political subdivision thereof" and thus do not work for an "employer." Because the members of Local 68 do not work for an "employer," they are not "employees." The court then noted that because the members of Local 68 are not employees, Local 68 is not a "labor organization." Finally, the court reasoned, because Local 68 is not a "labor organization," it cannot be held liable for secondary boycott activity.

The court mentioned PMA's argument that the legislative history of the 1959 amendments to Section 8(b)(4) of the NLRA clearly demonstrates that Congress thought that it was amending the NLRA in a way that would prohibit secondary boycotts by public sector unions. App., *infra*, 7a-

8a. But because the court considered these various statutory provisions, as well as the interaction among the provisions, to be "plain and unambiguous," the court held that it had "no call to consider legislative history." App., *infra*, 7a.

In reaching this decision, the Ninth Circuit expressly rejected the Second Circuit's *Marriott* decision. The Ninth Circuit noted that the *Marriott* court had "found the statute sufficiently ambiguous to require resort to legislative history," but the Ninth Circuit simply disagreed with that conclusion. App., *infra*, 7a.

B. The Second Circuit's Approach

In *Marriott*, the Second Circuit held that a union not otherwise subject to the NLRA was a "labor organization" for purposes of Section 303 of the LMRA and thus could be held liable for secondary boycott activities. The union there, which was organized under the Railway Labor Act and thus not generally covered by the NLRA, engaged in secondary boycotting activity against an employer subject to the NLRA. The district court granted summary judgment to the union following the same reasoning used by the Ninth Circuit here, and the Second Circuit reversed.

Directly contrary to the Ninth Circuit here, the Second Circuit found that the statutory language is "hardly a model of clarity in statutory draftsmanship," and that "[t]he provision in dispute here is sufficiently ambiguous to require resort to its legislative history." 557 F.2d at 298.

Examining the history of Section 8(b)(4), the court observed that, before 1959, unions subject to the Railway Labor Act rather than the NLRA were not prohibited from engaging in secondary boycotts. *Id.* at 296. The court then addressed the 1959 changes to Section 8(b)(4), which substantially broadened the scope of the ban on secondary boycotts. Turning to the legislative history of the 1959 amendments, the court quoted the following passage from the Senate Report on the bill:

> Under the definition section of the Taft-Hartley Act *railroad employees, agricultural workers, and governmental employees are not employees*

> *within the meaning of the act.* The Board has reached the conclusion that secondary boycotts by these exempt categories, and the inducement of such boycotts are not unfair labor practices. (*See International Rice Milling*, 84 N.L.R.B. 360, and *Di Giorgio Wine*, 87 N.L.R.B. No. 125.)
>
> *Secondary boycotts by these groups are just as much against the public interests as boycotts by anyone else.*
>
> *The bill, S. 748, would extend the ban to these excluded categories* by use of the words "any person" instead of the words "employees of any employer" in section 8(b)(4)(i) and (ii).

Id. at 297 (quoting S. Rep. No. 187, *reprinted in* 1959 U.S.C.C.A.N. 2318, 2384) (emphasis added). Indeed, the Senate report considered "[b]oycotts by railroad employees, agricultural workers, Government employees, and other groups now excluded from the secondary boycott ban of the Taft-Hartley Act" to be among "[t]he major loopholes in the present ban on secondary boycotts." 1959 U.S.C.C.A.N. 2318, 2384.

The *Marriott* court found that the legislative history of the 1959 amendment unequivocally demonstrated that a major concern of the drafters was "the prohibition of secondary boycotts and picketing" and that "the amendments were explicitly intended to end the exemption from this prohibition enjoyed by [Railway Labor Act] unions." 557 F.2d at 298-99. In light of these indicia of congressional intent and because of the "strong national policy against secondary activity by labor unions," the Second Circuit rejected the interpretation that has now been adopted by the Ninth Circuit in this case. *Id.* at 299.

C. The Need For Guidance From The Court

The decisions of the Second and Ninth Circuits directly conflict regarding the important issue of the scope of the ban on secondary boycotts embodied in Section 303 of the

LMRA. This question warrants the Court's review in this case. At stake are the rights of innocent, neutral third-parties all across the country to remain free from, and to seek redress against, the menacing blackmail that is the secondary boycott. Allowing the decision of the Ninth Circuit to stand would deliver a potent weapon to those public sector, agriculture, railroad, and airline employees who wish to engage in the type of unfair, damaging, and disruptive conduct expressly banned by federal law. Such a result is contrary to the intent of Congress, and the Court should issue the writ of certiorari to resolve this conflict between the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

March 7, 2000

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC MARITIME ASSOCIATION, on behalf of itself and its individually injured members,

Plaintiff-counter-defendant-Appellant,

v.

LOCAL 63, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION; LOCAL 13, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION; AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 68,

Defendants-counter-claimants-Appellees.

No. 98-55453

D.C. No.
CV-97-06757-JMI

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding
Argued and Submitted October 7, 1999
Filed December 8, 1999

Before: Pamela Ann Rymer and M. Margaret McKeown, Circuit Judges, and Edward F. Shea,[1] District Judge.

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[1]Honorable Edward F. Shea, United States District Judge for the Eastern District of Washington, sitting by designation.

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OPINION

SHEA, District Court Judge:

Appellant Pacific Maritime Association ("PMA") appeals the district court's dismissal of its suit against Appellee Local 68. The appeal presents an issue of first impression in this Circuit: whether Local 68, as a public sector union, is subject to liability for "secondary boycott" activity under § 303 of the Labor Management Relations Act of 1947[2] ("LMRA"), 29 U.S.C. § 187. The district court held 29 U.S.C. § 187 does not apply to public sector labor organizations and dismissed the suit for lack of subject matter jurisdiction. We affirm.

I. Factual Background

Appellant PMA is a multi-employer association of shipping, stevedoring, and terminal companies operating out of the Los Angeles/Long Beach Port. PMA is the bargaining representative for the employers and handles their labor relations issues with respect to longshoremen and marine clerks. Appellee Local 68 of the International Longshore and Warehouse Union ("ILWU") represents a small bargaining unit of port pilots who are employed by the City of Los Angeles. The Local 68 port pilots have no employment relationship with PMA member companies. Local 13 and Local 63, also defendants in the original action, are also ILWU organizations. The members of Local 13 and Local

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[2]June 23, 1947, ch. 120, Title III, § 303, 61 Stat. 158. The LMRA, also known as the Taft-Hartley Act, amended and encompasses the National Labor Relations Act ("NLRA") of 1935.

63 are longshoremen and marine clerks employed by PMA companies at the Los Angeles/Long Beach Port.

On about July 12, 1997, Local 68 went on strike following the expiration of its collective bargaining agreement with the City and unsuccessful contract renewal negotiations. That morning, Local 68 commenced picketing at the Yusen Terminal, a terminal operated by a PMA member. Members of Local 13 and Local 63 who were scheduled to work that day at Yusen Terminal refused to cross the picket line. On July 13, 1997, Local 68 continued picketing Yusen Terminal and began picketing the Matson and Evergreen Terminals. Members of Local 13 and Local 63 scheduled to work at the three terminals would not cross the picket lines. Local 68 picketed the three terminals for two more days, at which point the state court issued a temporary restraining order against the picketing.

II. Procedural Background

On September 10, 1997, PMA filed suit for damages against Locals 13, 63 and 68 in federal district court under 29 U.S.C. § 187(b), Section 303 of the Labor Management Relations Act of 1947, for engaging in unfair labor practices, as defined in 29 U.S.C. 158(b)(4)(i) and (ii)(B). Specifically, PMA alleged that, under 29 U.S.C. 158(b)(4)(i) and (ii)(B), the three Locals "unlawfully engaged in, or induced or encouraged, individuals employed by PMA members to engage in a strike and a refusal, in the course of their employment, to handle or work on said vessels and cargo at [the] terminals, and to refuse to perform services thereat, and otherwise . . . unlawfully threatened, coerced, and restrained PMA and its members and other persons engaged in commerce." PMA further alleged an object of the Locals' conduct was to "force or require PMA and its members to cease doing business with the City of Los Angeles" in order to force the City to accede to Local 68's bargaining demands. PMA claimed its members were damaged in excess of $1,000,000 because of the four-day work stoppage which resulted from Local 68's picketing of the terminals.

Local 68 moved for dismissal for lack of subject matter jurisdiction. The district court granted Local 68's motion on the basis that Section 303 does not apply to public sector labor organizations such as Local 68. The court's order was entered January 20, 1998. PMA filed this appeal on February 18, 1998.

III. The Standard of Review

Review of the district court's dismissal for lack of subject matter jurisdiction is de novo. *United States v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 968 (9th Cir.1999). Review of a district court's interpretation of a statute is also a question of law reviewed de novo. *Burrey v. Pacific Gas & Elec. Co.*, 159 F.3d 388, 392 (9th Cir. 1998).

IV. The Statute

[1] Section 303 of the LMRA, 29 U.S.C. § 187, provides

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any *labor organization* to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason o[f] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C.A. § 187 (West 1998) (emphasis added). United States Code Title 29 section 158(b)(4), which codifies section 8(b)(4) of the NLRA, in relevant part provides

[2] It shall be an unfair labor practice for a *labor organization* or its agents—

. . .

> (4)(i) . . . to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is-
>
> . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . : *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

29 U.S.C.A. § 158(b)(4) (West 1998) (emphasis added). Since Local 68 engaged in activities described by 29 U.S.C. § 158(b)(4)(i) and (ii)(B) which the industry terms "secondary boycott activities," at issue is whether Local 68 is a "labor organization," as the term is used in 29 U.S.C. §§ 187 and 158(b)(4).

"Labor organization," as it is used in 29 U.S.C. §§ 187 and 158(b), is defined as follows:

> The term "*labor organization* " means any organization of any kind . . . in which *employees* participate and which exists for the purpose . . . of dealing with *employers* concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (West 1998) (emphases added).

"Employee" and "employer" are further defined:

> The term "*employee*" . . . shall not include any individual employed as an agricultural laborer, . . . or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.] . . . or by any other person who is not an *employer* as herein defined.

29 U.S.C. § 152(3) (West 1998) (emphases added).

The term "*employer* " . . . *shall not include the United States* or any wholly owned Government corporation, . . . *or any State or political subdivision thereof*, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.].

29 U.S.C. § 152(2) (West 1998) (emphases added).

V. Statutory Interpretation

In several recent cases, the Supreme Court has reaffirmed that, in construing a statute, if the statute is clear, one looks no further. In *Hughes Aircraft Co. v. Jacobson*, the Court stated that, in any case of statutory construction, its analysis begins with the language of the statute. 119 S. Ct. 755, 760 (1999). "[W]here the statutory language provides a clear answer," the analysis also ends with the statute's language. *Id.* In *Robinson v. Shell Oil Co.*, the Court announced that the first step in interpreting a statute is determining "whether the

language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." 519 U.S. 337, 340 (1997). The inquiry ceases if the statutory language is unambiguous and " 'the statutory scheme is coherent and consistent." *Id.* (citations omitted). The "ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

[3] By the plain, unambiguous language of the LMRA, the definition of "labor organization" excludes an organization of employees of a political subdivision of a state. Because Local 68 represents port pilots employed by the City of Los Angeles, it is an organization of employees of a political subdivision of the State of California and is therefore not a "labor organization," as set forth in 29 U.S.C. § 152(5). Hence, Local 68, as a public sector union, is not subject to liability under 29 U.S.C. § 187 for "secondary boycott" activity. The language being plain and unambiguous, we have no call to consider legislative history.

We recognize the Second Circuit reached a different conclusion in *Marriott In-Flite Services v. Local 504, Air Transport Division*, 557 F.2d 295 (2d Cir.1977). At issue in *Marriott In-Flite Services* was whether a union organized under the Railway Labor Act was a " 'labor organization' subject to the secondary boycott provisions of 29 U.S.C. § 158(b)(4)." *Id.* at 295. The court determined that though a literal reading of the LMRA suggested a "Railway Labor Act" labor organization was not subject to 29 U.S.C. § 158(b)(4), *id.*, the LMRA was sufficiently ambiguous to require resort to its legislative history, *id.* at 298. Citing the

Senate Report on the 1959 amendments[3] to 29 U.S.C. § 158(b)(4), the court found that Congress intended the amendments to prohibit secondary boycott activity by, *inter alia*, workers governed by the Railway Labor Act. See *id.* at 297- 98. Favoring its interpretation of Congressional intent over a literal reading of the LMRA, the court held that a union representing employees governed by the Railway Labor Act was a "labor organization" subject to the secondary boycott provisions of 29 U.S.C. § 158(b)(4). See *id.* at 297- 98.

However, two Supreme Court cases have reached holdings opposite the holding of *Marriott In-Flite Services* and essentially found the language of the LMRA to be plain and unambiguous. In *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, the Court noted that comprehensive federal legislation regulating railway labor disputes already existed when the NLRA was enacted. 394 U.S. 369, 376-77 (1969). This and the plain language of 29 U.S.C. § 158(b)(4) led the Court to conclude that disputes covered by the Railway Labor Act remained exempt from the NLRA despite the 1959 Taft-Hartley amendments:

> [i]n 1959, [29 U.S.C. § 158(b)(4)] was amended to expand the class of persons protected *against* secondary pressures .... However, the amendment did not expand the scope of 'employees' or 'labor organizations'

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[3]Section 704(a) of the Labor-Management Reporting and Disclosure Act ("LMRDA") of 1959 amended 29 U.S.C. § 158(b)(4), Sept. 14, 1959, Pub. L. No. 86-257, Title VII, § 704(a), 73 Stat. 542-545. The LMRDA is also known as the Griffin-Landrum or Landrum-Griffin Act.

> whom the Act forbade to *engage* in such conduct.

Id. at 377 n. 10 (emphases added). The *Trainmen* Court further elaborated that, under the 1959 amendments, "Congress enacted 'no . . . sweeping prohibition' of secondary conduct." 394 U.S. at 387-88 (citations omitted). Finally, the Court held that, "until Congress acts, picketing [by workers of employers subject to the Railway Labor Act]—whether characterized as primary or secondary—must be deemed conduct protected against proscription." *Id.* at 392-93. Thus, the Supreme Court determined that the 1959 amendments did not increase the types of labor organizations that could be held liable under 29 U.S.C. § 187; instead, the amendments broadened the activities for which the organizations already covered by the LMRA would be liable.[4] Notably, this decision preceded *Marriott In-Flite*

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[4]This is also the position of the General Counsel of the National Labor Relations Board ("NLRB"), the federal agency responsible for enforcement of the LMRA. In the instant case, the NLRB "concluded that it did not have jurisdiction over Local 68 by reason of its representational status of public employees." (Appellant's Excerpts of R. at 5 ¶ 12.) In previous cases, the NLRB General Counsel has held that a union that is not a labor organization under 29 U.S.C. § 152(5) cannot violate 29 U.S.C. § 158. *See, e.g., Air Line Pilots Association,* No. 12-CC-1217, 1990 NLRB GCM LEXIS 56 (NLRB Office of General Counsel, Dec. 27, 1990). In *Air Line Pilots*, the General Counsel held that a union comprising Railway Labor Act workers had not violated 29 U.S.C. § 158, though the union had induced secondary boycott activity, because the union was not a 29 U.S.C. § 152(5) "labor organization." See *id.* at *9-*10. "[T]he 1959 amendments provide that a labor organization violates [29 U.S.C. § 158(b)(4)(B)], even if the *induced* persons are not . . . employees [under 29 U.S.C. § 152(3)]

[Footnote continued on next page]

Services. Yet, *Marriott In-Flite Services* dismissed parts of *Trainmen* as "ambiguous dictum." *Marriott In-Flite Services*, 557 F.2d at 299.

Ten years after *Marriott In-Flite Services*, the Supreme Court in *Burlington N. R. Co. v. Bhd of Maintenance of Way Employes* [sic] again stated that the NLRA "does not contain a 'sweeping prohibition' of secondary [boycott] activity" but instead "condemns specific union conduct directed to specific objectives." 481 U.S. 429, 440 n. 7, 448 (1987) (citations omitted). Finding it significant that, under 29 U.S.C. §§ 152(2) and (3), "Congress excluded rail carriers and rail employees from the coverage of the NLRA," the Court concluded "that the NLRA could not make clearer Congress' intent to prohibit federal courts from [enjoining a union representing Railroad Labor Act employees from engaging in secondary boycott activity against railway companies other than the one employing the striking workers]." *Id.* at 448-49.

Although Congress's rationale for excluding from the definition of "employer" all employers subject to the Railway Labor Act may have been different from its rationale for excluding all employers that are political subdivisions of a state, we find the *Trainmen* and *Burlington Northern* plain meaning interpretation of 29 U.S.C. § 158(b)(4) dispositive. The language of the LMRA plainly excludes an organization of employees of a political subdivision of a state from the 29 U.S.C. § 152(5) definition of "labor organization." Thus, given the plain language of 29 U.S.C. §§ 152(2), (3), and (5) and §§ 158 and 187, and given the Supreme Court's view of the plain meaning and intent of 29 U.S.C. § 158, we hold that an organization of

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[Footnote continued from previous page]
and even if the restrained companies are not . . .employers [under 29 U.S.C. § 152(2)]. But the 1959 amendments did not change the requirement that the offending entity be a labor organization." *Id.* at *9 (emphasis added).

public sector employees is not liable under 29 U.S.C. § 187 for damages caused by its secondary boycott activities.

That Appellant is without a remedy is for Congress, not this Court, to redress. As the *Burlington Northern* Court observed, "if Congress should now find that abuses in the nature of secondary activities have arisen in the railroad industry . . . it is for the Congress, and not the Courts, to strike the balance between the uncontrolled power of management and labor to further their respective interests." 481 U.S. at 453 (quoting *Trainmen*, 394 U.S. at 392).

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PACIFIC MARITIME ASSOCIATION, Plaintiff, v. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 63, et al., Defendants.	CV-97-6757 JMI (JGx) **ORDER GRANTING DEFENDANT THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 68's MOTION TO DISMISS**

IT IS HEREBY ORDERED:

Defendant The International Longshore and Warehouse Union, Local 68's ("Local 68") Motion to Dismiss for Lack of Subject Matter Jurisdiction came before this Court on December 15, 1997. After careful review, considering all the arguments and materials presented by the parties, the Court hereby GRANTS Defendant's motion.

BACKGROUND

This case arises out of a labor dispute between defendant Local 68, a labor union representing port pilots in the Port of Los Angeles, and their employer, the City of Los Angeles. During the course of this dispute, members of Local 68 picketed terminals at the Port of Los Angeles where employees of the City of Los Angeles work. These terminals are operated by various shipping and stevedoring companies that are members of plaintiff employer association, Pacific

Maritime Association ("PMA"). Plaintiff alleges that defendant Local 68's picketing activity constituted an illegal secondary boycott, and seeks damages pursuant to Section 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187.

DISCUSSION

I. THE LMRA AND THE NLRA

Section 303 of the LMRA provides a federal cause of action to any party injured in his business or property by an "unfair labor practice" engaged in by a "labor organization," as those terms are defined by the National Labor Relations Act ("NLRA"). 29 U.S.C. § 187.

"[L]abor organization" is defined under Section 2(5) of the NLRA as an organization that represents employees for the purpose of dealing with "employers." 29 U.S.C. § 152(5). Section 2(2) of the NLRA, however, specifically excludes, inter alia, public sector employers from the definition of "employer."[5] 29 U.S.C. § 152(2). Therefore, a labor organization representing employees of public sector employers does not fall within the scope of the Section 8(b)(4)(B) of the NLRA.

---

[5]This provision provides, in relevant part,

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State of political subdivision thereof . . . .

II. THE INSTANT ACTION

In this case, Local 68 is a union representing port pilots in the Port of Los Angeles. The members of Local 68 are employed by the Harbor Department of the City of Los Angeles. See Complaint ¶ 7. Consequently, Local 68 is public sector labor organization which does not fall within the specific scope of Section 8(b)(4)(B) of the NLRA. It is on this ground that defendant Local 68 seeks to have Plaintiff's action dismissed.

Plaintiff argues, however, that Section 8(b)(4)(B) should be construed more broadly than the language of the statute implies. Plaintiff raises legislative intent arguments in an attempt to persuade the Court that this provision applies to Local 68, a public sector labor organization. Plaintiff's arguments fail, however, in the face of traditional rules of statutory construction.

As a general rule, when interpreting a statute, courts are to first consult the statutory language. It is only where that statutory language is unclear or ambiguous that the court should look to the legislative history of the statute for guidance. See Northwest Forest Resource Council v. Glickman, 82 F.2d 825, 830-31 (9th Cir. 1996). Furthermore, where the plain language of the statute is clear, that statutory text controls, notwithstanding legislative history to the contrary. See Hearn v. Western Conference of Teamsters Pension Trust Fund, 68 F.3d 301, 304 (9th Cir. 1995) ("But legislative history – no matter how clear, can't override statutory text.")

In this case, the language of the NLRA is clear. There is no need to look beyond the plain meaning of the statute. Section 8(b)(4)(B) does not apply to public sector labor organization. Accordingly, Section 8(b)(4)(B) does not apply to Local 68.

III. CONCLUSION

For the above-stated reasons, this Court hereby GRANTS defendant Local 68's motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(1).

IT IS SO ORDERED.

DATED: January 16, 1998

James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

PACIFIC MARITIME ASSOCIATION, a California corporation, on behalf of itself and its individually injured members,

Plaintiffs,

v.

THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 63, an unincorporated association; THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 13, an unincorporated association; THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 68, an unincorporated association; and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 97-6757 JMI (JGx)

ORDER GRANTING CERTIFICATION UNDER RULE 54(b)

IT IS HEREBY ORDERED as follows:

On January 16, 1998, the Court granted Defendant International Longshore and Warehouse Union, Local 68's

("Local 68's") motion to dismiss for lack of subject matter jurisdiction on the basis that Section 303 of the Labor Management Relations Act does not apply to public sector labor organizations such as Defendant Local 68. This Order conclusively resolved and finally adjudicated PMA's entire claim against Defendant Local 68.

The Court finds that there is no just reason for delay in pursuing an appeal as to Defendant Local 68. The basis for the Court's judgment dismissing Defendant Local 68 is separate and distinct from the issues remaining as to the other Defendants, ILWU Local 13 and Local 63. Local 68 was dismissed solely on the jurisdictional basis of its status as a public sector labor organization. There are no such jurisdictional issues as to the remaining Defendants ILWU Local 13 and Local 63 because they are not public sector labor organizations. Thus, the Ninth Circuit will not be asked to address any issues which are similar to the issues still pending before this Court, and immediate appeal will serve the interests of judicial economy by avoiding the potential for a second trial. See Core-Vent Corp. v. Nobel Indus., 11 F.3d 1483, 1484 (9th Cir. 1993) (upholding district court's Rule 54(b) certification of order which dismissed some, but not all, defendants for lack of personal jurisdiction because immediate appeal of the separate and unrelated jurisdictional issue "may obviate the need for a second trial" and "would not lead to undesirable 'piecemeal appeals'").

Accordingly, there is no just reason for delay, and the Court hereby grants Plaintiff PMA's motion for certification to appeal its order dismissing Local 68 as a final judgment, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

DATED: March 24, 1998

James M. Ideman
United States District Judge

Supreme Court, U.S.
FILED
MAY 3 2000
CLERK

No. 99-1483

IN THE

Supreme Court of the United States

PACIFIC MARITIME ASSOCIATION,
Petitioner,

v.

THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 68, an unincorporated association,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT

In 1997, Local 68 of the International Longshore and Warehouse Union (ILWU)—a public sector local labor union that exclusively represents port pilots employed by the City of Los Angeles—called a strike following unsuccessful negotiations with the City over a new collective bargaining agreement. Pet. App. 2a-3a.

In conjunction therewith, Local 68 placed picket lines around several Port of Los Angeles Terminals operated by private shipping and stevedoring companies. Local 68's picket lines were honored by those shipping and stevedoring companies' union employees. Pet. App. 2a-3a.

In response, the City of Los Angeles brought suit against Local 68 in the Superior Court of the State of California, County of Los Angeles, seeking injunctive relief and that court issued a temporary restraining order against Local 68's picketing. On the issuance of that order, Local 68 ceased its picketing and the employees of the private shipping and stevedoring companies returned to work. *Id.*

After the California state court had acted, the Pacific Maritime Association (PMA)—an association representing private shipping and stevedoring companies in collective bargaining—filed unfair labor practice charges with the National Labor Relations Board (NLRB) alleging that Local 68's picketing had violated § 8(b)(4) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(b)(4). Pet. App. 9a n. 4. The NLRB General Counsel dismissed these charges on the ground that the Board "did not have jurisdiction over Local 68 by reason of its representational status of public employees." *Id.*

PMA then filed a suit under § 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187, against Local 68, and

against the two local unions that represent the employees of the private shipping and stevedoring companies that operate the Port of Los Angeles Terminals. The PMA suit alleged that the locals had engaged in the unfair labor practice defined in NLRA § 8(b)(4). Pet. App. 3a. The District Court dismissed the claim against Local 68 on the ground that "a labor organization representing employees of public sector employers does not fall within the scope of Section 8(b)(4) of the NLRA." *Id.* Finding that the "judgment dismissing Defendant Local 68 is separate and distinct from the issues remaining as to the other Defendants, ILWU Local 13 and Local 63," the District Court granted PMA's motion to certify that judgment for immediate appeal. *Id.* at 17a. On appeal, the Ninth Circuit affirmed the District Court's judgment. *Id.* at 11a.

ARGUMENT

The decision below is entirely correct. Indeed, as the Court of Appeals stressed, that decision is dictated by the plain language of the Labor Management Relations Act/National Labor Relations Act secondary boycott provisions and by two decisions of this Court construing that language—*Railroad Trainmen v. Terminal Co.*, 394 U.S. 369 (1969) and *Burlington Northern R. Co. v. Maintenance Employees*, 481 U.S. 429 (1987)—and is in accord with the National Labor Relations Board's construction of those provisions. Moreover, the sole decision invoked by the petitioner as conflicting with the decision below—*Marriott In-Flite Services v. Local 504 Transport Workers*, 557 F.2d 295 (2d Cir. 1977)—is no longer good law in the Second Circuit in light of that court's later *Long Island R. v. Intern. Ass'n of Machinists*, 874 F.2d 901, 910 (2d Cir. 1989) decision. The *certiorari* petition should therefore be denied.

1. (a) In essence, LMRA § 303(b) provides for a federal court damage action by a person "injured in his business or property by reason of any violation of [§ 303] subsection a," and

subsection (a) makes it a violation "for any labor organization to engage in any action or conduct defined as an unfair labor practice in [NLRA § 8] (b)(4)"—*viz.*, in the NLRA secondary boycott provision.

For the purposes of both LMRA § 303, and the related NLRA § 8(b)(4), the term "labor organization" is a defined term:

> The term "labor organization" means any organization of any kind . . . in which *employees* participate and which exists for the purpose . . . of dealing with *employers*. [NLRA § 2(5), 29 U.S.C. § 152(5); emphasis added]

The terms "employee" and "employer" are, in turn, defined as follows in NLRA §§ 2(3) & 2(2), 29 U.S.C. §§ 152(3) & 152(2):

> The term "employee" . . . shall not include any individual employed . . . by one employer subject to the Railway Labor Act . . . or by any other person who is not an *employer* as herein defined.
>
> * * * *
>
> The term "*employer*" . . . *shall not include any State or political subdivision thereof* or any person subject to the Railway Labor Act. [Emphasis added.]

What follows ineluctably from the foregoing, as the Court of Appeals held, is this:

> By the plain, unambiguous language of the LMRA, the definition of "labor organization" excludes an organization of employees of a political subdivision of a state. Because Local 68 represents port pilots employed by the City of Los Angeles, it is an organization of employees of a political subdivision of the State of California and is therefore not a "labor organization," as set forth in 29 U.S.C. § 152(5). Hence, Local 68, as a public sector union, is not subject to liability under 29 U.S.C. § 187 for "secondary boycott" activity. [Pet. App. 7a.]

(b) To put the foregoing another way, LMRA § 303/NLRA § 8(b)(4) prohibit secondary boycott picketing by *NLRA unions* but *not* such picketing by *public sector unions*. As the Court of Appeals recognized, that conclusion is entailed by this Court's conclusion—stated first in *Railroad Trainmen*, *supra*, and reaffirmed in *Burlington Northern*, *supra*,—that the LMRA/NLRA secondary boycott provisions do *not* cover RLA union secondary boycott picketing. That is so because, as we have seen, RLA unions are excluded from the LMRA/NLRA regulatory scheme by the same provisions—NLRA §§ 2(2), 2(3) & 2(5)—that exclude public sector unions.

In *Railroad Trainmen*, which arose out of a state court injunction against an RLA union's picketing, the Court concluded that nothing in federal law prohibits RLA union secondary boycott picketing and that it follows that RLA union "picketing—whether characterized as primary or secondary—must be deemed conduct protected against state proscription." 394 U.S. at 369. In reaching that conclusion, the Court rejected the proposition that RLA union secondary boycott picketing is covered by the prohibitions of NLRA § 8(b)(4):

> Sections 2(2) and (3) of the NLRA, 29 U.S.C. §§ 152(2), (3), expressly exempt from the Act's coverage employees and employers subject to the Railway Labor Act. And when the traditional railway labor organizations act on behalf of employees subject to the Railway Labor Act in a dispute with carriers subject to the Railway Labor Act, the organizations must be deemed, *pro tanto*, exempt from the National Labor Relations Act. See NLRA § 2(5), 29 U.S.C. § 152(5). [394 U.S. at 376-377; footnote omitted]

The *Railway Trainmen* Court noted that in 1947 when LMRA § 303/NLRA § 8(b)(4) were added to the law, the fact that those provisions did *not* cover RLA union secondary boycott activity but only NLRA union secondary boycott activity was expressly

noted, was criticized as "inequitable" by opponents of the legislation and was defended as proper by Senator Taft on the ground that "railway labor has never been covered by the Wagner Act." 394 U.S. 376-377, n.10. As to the 1959 amendments to the LMRA/NLRA secondary boycott provisions, the Court added:

> In 1959, § 8(b)(4) was amended to expand the class of persons protected against secondary pressures. 73 Stat. 542; see *Steelworkers v. NLRA*, 376 U.S. 492, 500-501 (1964). However, the amendment did not expand the scope of "employees" or "labor organizations" whom the Act forbade to engage in such conduct. [394 U.S. at 376-377 n. 10]

In its ultimate terms, *Railway Trainmen* was a preemption case and doubts as to whether federal law permits or prohibits RLA union secondary boycott picketing persisted. In the *Burlington Northern* case, which arose out of a federal court injunction against such picketing, the Court made it plain beyond peradventure that federal law permits RLA union secondary boycott picketing.

The *Burlington Northern* Court noted that it was "conce[ded] . . . that the RLA does not contain an express mandate limiting the scope of self-help available to an [RLA] union once the RLA's major dispute resolution procedures have been exhausted" and then "declin[ed] . . . to find in [the RLA] an implied limit on a union's resort to secondary activity." 481 U.S. 446, 452-453. In so doing, the Court rejected the contention that the LMRA § 303/NLRA § 8(b)(4) secondary boycott provisions provide a basis for treating RLA union secondary boycott picketing as an unfair labor practice and for permitting the federal courts to enjoin such activity. 481 U.S. at 448-449. Echoing *Railroad Trainmen*, the Court pointed out that "it is significant that Congress excluded rail carriers and rail employees from the coverage of the NLRA," citing NLRA

§§ 2(2) & 2(3), and that precisely because § 8(b)(4) does not cover RLA union secondary activity "even the NLRB has no authority to seek an injunction" against RLA union secondary boycott picketing. *Id.*

(c) It is also very much to the point, as the Court of Appeals noted, that consistent with the language of NLRA § 8(b)(4), its legislative history and this Court's *Railroad Trainmen* and *Burlington Northern* decisions,

> the NLRB General Counsel has held that a union that is not a labor organization under 29 U.S.C. § 152(5) cannot violate 29 U.S.C. § 158. *See, e.g., Air Line Pilots Association*, No. 12-CC-1217, 1990 NLRB GCM LEXIS 56 (NLRB Office of General Counsel, Dec. 27, 1990). In *Air Line Pilots*, the General Counsel held that a union comprising Railway Labor Act workers had not violated 29 U.S.C. § 158, though the union had induced secondary boycott activity because the union was not a 29 U.S.C. § 152(5) "labor organization." *See id.* at *9-*10. "[T]he 1959 amendments provide that a labor organization violates [29 U.S.C. § 158(b)(4)(B)], even if the *induced* persons are not . . . employees [under 29 U.S.C. § 152(3) and even if the restrained companies are not . . . employers [under 29 U.S.C. § 152(2)]. But the 1959 amendments did not change the requirement that the offending entity be a labor organization." *Id.* at *9 (emphasis added). [Pet. App. 9a-10a.]

2. Against all this, the petitioner makes two points, but neither advances its position.

First, on the merits, the petitioner argues that "the legislative history of the 1959 amendments to Section 8(b)(4) of the NLRA clearly demonstrates that Congress thought that it was amending the NLRA in a way that would prohibit secondary boycotts by public sector unions." Pet. 9. The short but complete answer is that this Court flatly rejected that understanding of the 1959

amendments and their legislative history in *Railroad Trainmen*, 394 U.S. at 376-377 n.10 (quoted p. 5 *supra*).

Second, petitioner posits a conflict in the Courts of Appeals based on the Second Circuit's *Marriott In-Flite Services*, *supra*, decision permitting an LMRA § 303 damages suit predicated on an RLA union's secondary boycott picketing. But, on the strength of this Court's subsequent *Burlington Northern* decision, the Second Circuit has since repudiated the main premise of *Marriott In-Flite Services* and by so doing has left that decision without present force or effect.

The *Marriott In-Flite Services* Court rejected the union's reliance on *Jacksonville Terminal* on the theory that this Court had held only that state law prohibiting RLA union secondary activity is preempted and that the Court had done so without "decid[ing] whether the activity at stake was 'primary' or 'secondary' or whether it was protected by the RLA." 557 F.2d at 299. *Marriott In-Flite Services* thus disregards the portion of *Jacksonville Terminal* stating that NLRA § 8(b)(4) does not cover RLA union secondary boycott activity as "ambiguous dictum." 557 F.2d at 299.

That was, at best, a tendentious reading of *Jacksonville Terminal* at the time. Be that as it may, after the further elucidation provided by *Burlington Northern*, the Second Circuit has corrected itself by recognizing "that secondary picketing [by RLA unions] is allowed by *Burlington Northern*." *Long Island R.*, *supra*, 874 F.2d at 910. Simply stated, the recognition that *Burlington Northern* holds that RLA union secondary boycott picketing is protected by the RLA (and is not invalidated by NLRA § 8(b)(4)) undermines *Marriott In-Flite Services'* premise and its rationale entirely.[1]

---

[1] We would be derelict if we failed to point out that *Marriott In-Flite Services'* reading of the LMRA § 303/NLRA § 8(b)(4) secondary boycott

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

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provisions is not only belied by *Jacksonville Terminal* and *Burlington Northern*, but is plainly wrong on its own terms.

The *Marriott In-Flite Services* Court recognized that the plain language of LMRA § 303/NLRA § 8(b)(4) does *not* cover RLA union secondary boycott activity and then determined to "disregard" the plain statutory language as at variance with the Congressional intent revealed in the 1959 legislative history. 557 F.2d at 297-299. The only such legislative history that the *Marriott In-Flite Services* Court cited is a passage from what that court refers to as "the Senate Report on the 1959 bill." *Id.* at 297.

But the passage in question is in fact from a statement of "Minority Views" on behalf of Senators who "oppose[d] the passage of th[e] bill" being reported. Sen. Rep. No. 187, 86th Cong., 1st Sess. 70(1959), reprinted in NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA Leg. Hist.), vol. 1, p. 466 (1959).

And, there is, in fact, *nothing* in the 1959 legislative history showing a Congressional intent to cover RLA union secondary boycott activity by LMRA § 303/NLRA § 8(b)(4). To the contrary, the sponsors and supporters of the 1959 § 8(b)(4) amendment made it plain that their quite different aim, clearly expressed in the statutory language of their amendment, was to make the existing prohibition on *NLRA union secondary boycott activity* more binding by assuring that those unions could no longer "avoid the existing provisions by inducing individual employees, or workers not defined as employees by the act such as railroad and agricultural workers -- to refuse to handle the products of the person with whom they want the employer to cease doing business." *Labor Board v. Servette*, 377 U.S. 46, 52 n.8 (1964) (quoting Hearings before the Senate Subcommittee on Labor and Public Welfare on § 505 etc., 86th Cong., 1st Sess., p.265 (testimony of Secretary of Labor Mitchell)). *See also, Labor Board v. Fruit Packers*, 377 U.S. 58, 64-68 (1964) (detailing the NLRA § 8(b)(4) amendment legislative history).

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No. 99-1483

IN THE
Supreme Court of the United States

PACIFIC MARITIME ASSOCIATION,

Petitioner,

v.

THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 68, an unincorporated association,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its petition for a writ of certiorari, Pacific Maritime Association ("PMA") demonstrated that the holding of the United States Court of Appeals for the Ninth Circuit in this matter – that public sector unions may not be held liable for secondary boycott activity under Section 303 of the Labor Management Relations Act (the "LMRA") – conflicts directly with the holding of the United States Court of Appeals for the Second Circuit in *Marriott In-Flite Services v. Local 504, Air Transport Division, Transport Workers*, 557 F.2d 295 (2d Cir. 1977). Indeed, the Ninth Circuit itself expressly "recognize[d] [that] the Second Circuit reached a different conclusion" in *Marriott*.

Respondent presents two arguments in opposition. *First*, respondent asserts that the decisions of this Court in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), and *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987), conclusively establish that public sector unions cannot be subject to Section 303. *See* Opp. 2-6.

Second, respondent argues that notwithstanding the Ninth Circuit's recognition that it was creating a divergence in the federal appellate case law, there is in fact no difference in the law of the Second and Ninth Circuits. Specifically, respondent argues that the Second Circuit abandoned the rule of *Marriott* in *Long Island Railroad Co. v. International Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989). *See* Opp. 7.

Neither of respondent's contentions has merit, and PMA respectfully submits that this Court should grant the writ of certiorari in order to resolve the split in the Circuits regarding this important issue of federal labor law.

A. This Court Has Expressly Left Undecided Whether A Non-NLRA Union Can Be Subject To Liability Under Section 303 Of The LMRA

Respondent asserts that this Court's decisions in *Jacksonville Terminal* and *Burlington Northern* resolve the question presented in the petition for certiorari: whether a public sector union is liable under Section 303 of the LMRA for secondary boycott activities that inflict substantial economic damage upon a neutral employer. In those cases, this Court held that neither the state courts nor the federal courts may enjoin secondary activity by unions subject to the Railway Labor Act (the "RLA") directed against employers subject to the RLA. *See Jacksonville Terminal*, 394 U.S. at 380-81 (state courts); *Burlington Northern*, 481 U.S. at 450-53 (federal courts). The critical fact common to both cases is that all parties to the disputes were subject to the RLA, which has extensive provisions for resolving conflicts between unions and employers.

The reasoning of those cases is inapplicable, however, when one or more parties to a labor dispute is subject to the National Labor Relations Act (the "NLRA"). In *Jacksonville Terminal*, this Court carefully avoided expressing an opinion as to the legality of secondary boycotting in such disputes:

> Whatever might be said where railway organizations act as agents for, or as joint venturers

> with, unions subject to the NLRA; or where railway unions are engaged in a dispute on behalf of their nonrail employees; or where a rail carrier seeks a remedy against the conduct of nonrail employees, none of these is this case. *This is a railway dispute, pure and simple.*

394 U.S. at 377 (citations omitted; emphasis added). Indeed, this Court expressly stated that "[o]ur holding is, of course, limited to disputes subject to the Railway Labor Act." *Id.* at 393 n.25. The opinion cited *International Brotherhood of Electrical Workers v. NLRB*, 350 F.2d 791 (D.C. Cir. 1965), a case holding unions that were subject to the RLA liable under Section 303 of the LMRA for secondary boycott activity when acting in concert with NLRA unions. *See* 350 F.2d at 792.

Thus, after *Jacksonville Terminal*, the rule is that secondary boycotting is not unlawful in the context of a dispute solely between RLA unions and employers. *Burlington Northern* was also a "railway dispute, pure and simple," and did not address the categories of disputes involving non-RLA entities expressly distinguished in *Jacksonville Terminal*. It is therefore an open question whether a non-NLRA union such as respondent may lawfully engage in secondary boycotting in concert with unions subject to the NLRA and against an employer subject to the NLRA.

Indeed, respondent engaged in the secondary boycott activity in issue along with two unions, Local 13 and Local 63 of the International Longshore and Warehouse Union, that are subject to the NLRA. *See* Pet. App. 2a-3a. This case therefore falls squarely within the category of disputes this Court expressly chose not to express an opinion on in *Jacksonville Terminal*, 394 U.S. at 377.

B. The Second Circuit Has Not Abrogated *Marriott*

Respondent states that the Second Circuit has "repudiated the main premise of *Marriott In-Flite Services* and by doing so has left that decision without present force or effect." Opp. 7. Respondent bases that assertion on a single quote

plucked from *Long Island Railroad Co. v. International Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989). According to respondent, "the Second Circuit has corrected itself by recognizing 'that secondary picketing [by RLA unions] is allowed by *Burlington Northern*.'" Opp. 7 (quoting *Long Island Railroad Co.*, 874 F.2d at 910).

But all parties to the dispute in *Long Island Railroad Co.*, as in *Jacksonville Terminal* and *Burlington Northern*, were subject to the RLA: once again, "a railway dispute, pure and simple." At issue in *Long Island Railroad Co.* was whether the court could enjoin a sympathy strike by unions subject to the RLA that had not first exhausted the RLA dispute resolution procedures. *Long Island Railroad Co.* neither mentions *Marriott* nor purports to decide questions relating to the applicability of Section 303 of the LMRA to conflicts involving both NLRA and non-NLRA entities.

Marriott remains the rule in the Second Circuit with respect to secondary boycott activity by non-NLRA unions against NLRA employers. Thus, the law of the Second and Ninth Circuits is in conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

May 17, 2000

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